**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**



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| Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996 | ) ) ) ) ) | CC Dkt. No. 98-146 |

# REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.

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## SUMMARY

The comments filed in this proceeding support U S WEST's observation that technological convergence is creating a single, unified market for broadband services that is making existing regulatory classifications obsolete. They agree that this progress, if allowed to proceed unhindered, will prevent any one provider from having bottleneck control of the "last mile" and make regulation of the marketplace unnecessary. They also recognize that a failure to adapt regulation to the reality of convergence will thwart this progress by discouraging carriers from investing the facilities needed to compete in other segments of the market and by distorting the marketplace in favor of those providers who, by historical accident, compete in the advanced services market unhindered by legacy regulation.

In this reply, U S WEST argues that the Commission must encourage intermodal competition and achieve regulatory parity by *de*regulating all providers of competitive data services and nonbottleneck network facilities. First, the evolving single market for broadband services makes the forward extension of old regulatory classifications untenable. Second, Commission regulations, most notably network access and discounted resale rules, diminish network providers' incentives to invest in infrastructure and deploy advanced capability; accordingly, the Commission should limit the application of these regulations to those few facilities and services for which no functional substitutes are available in the marketplace. Finally, the Commission should reject the ISPs' demand for new regulations of incumbent LECs. There are already extensive protections in place — the *Computer III* and ONA rules — that the Commission has long deemed sufficient to safeguard the interests of enhanced service providers; and the ISPs' unsubstantiated and inflammatory accusations of discrimination obscure the fact that U S WEST has, voluntarily and in good faith, gone well beyond its *Computer III* and ONA obligations to work with state public utility commissions and the ISP community to accommodate ISP concerns.

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## REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") respectfully submits these comments in reply to the comments filed in the above-captioned docket.

## PRELIMINARY STATEMENT

In its comments, U S WEST observed how technological convergence is fast creating a single, unified market for broadband, and how network providers from historically different segments of the communications industry are starting to compete with one another to provide voice, video, and high-speed data services. Traditional regulatory distinctions among services are rapidly becoming obsolete. U S WEST urged the Commission to set as its first priority the acceleration of this process by freeing all network providers to expand into new segments of the marketplace, by avoiding unnecessary regulation of competitive services and competitively provided facilities, and by lifting rules that discourage providers from investing in and deploying advanced telecommunications infrastructure. The Commission has the opportunity to encourage the development of a sustainable competition among facilities-based providers that will prevent any one of them from having bottleneck control of the "last mile" and will thereby obviate the need for regulatory intervention. Such action also will carry out

Congress's unambiguous command to "take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Act § 706(b).

Many commenters have confirmed U S WEST's view. Comments from wireless, satellite, cable, fiber, electricity, and telephone providers attest to the convergence of their service plans and confirm that each is beginning to eye the others' markets. The network providers who are making massive investments in infrastructure to bring this about — including recent converts such as AT&T — agree that unbundling and resale obligations destroy incentives to invest, make it impossible for competitors to differentiate themselves in the marketplace, and force providers to limit the scope of their deployment plans. Many commenters also agree that technological convergence should not be an excuse to extend legacy regulation into competitive markets, and that a blindered focus on how competitors within *particular* market segments interact with each other may short-sightedly sacrifice the competition among *all* potential players and segments that would enable the Commission to step back from the market altogether. Finally, a preponderance of commenters agree with U S WEST that Section 706 is a fundamentally *de*regulatory mandate to the Commission, declaring that the best way to ensure that "all Americans" have access to the Information Age is to free network providers to invest in the infrastructure needed to reach these individuals.

But other commenters seek to cut this proceeding loose from its moorings. Ignoring that Section 706 directs the Commission to "remove barriers to *infrastructure investment*," these commenters propose sweeping new regulations granting further governmental

rights of access to incumbents' networks — for example, new unbundling rules,[1] an unprecedented extension of *Computer III*, ONA, and equal-access requirements,[2] and even a *re*regulation of inside wiring[3] — that would only discourage incumbents from risking their capital. Moreover, although these commenters correctly note that Congress defined "advanced telecommunications capability" in technology- and competitor-neutral terms, they still hope to have the Commission pick market winners and losers (and include themselves among the winners); they selectively bootstrap their own technologies into the definition of "advanced telecommunications capability" while attempting to deny their competitors the deregulatory flexibility that Congress intended. And whereas the Commission properly recognized in the Notice of Inquiry that the development of a single market for broadband could collapse traditional regulatory categories and possibly even obviate the need for regulation,[4] these commenters propose utterly self-serving responses to convergence: either achieve regulatory parity by extending *maximal* regulation to *all* network providers, or blindly maintain obsolete

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[1] *See, e.g.*, Allegiance Telecom at 4-7, 17-19; Ass'n for Local Telecommunications Svcs. at 16-17; DSL Access Telecommunications Alliance at 16-17; Retail Internet Service Providers at 14-17.

[2] *See, e.g.*, ADC Telecommunications at 18; America Online at 11-13; Coalition of Utah Independent Internet Service Providers at 3-6; Retail Internet Service Providers at 11-12.

[3] *See, e.g.*, Allegiance Telecom at 8-11; Ass'n for Local Telecommunications Svcs. at 18-22; AT&T at 48-52; Teledesic at 6-10.

[4] Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706*, CC Dkt. No. 98-146, ¶¶ 80-81 (rel. Aug. 7, 1998) ("*Notice of Inquiry*").

regulatory classifications in order to give some companies (those that have their roots in a lightly regulated sector) a permanent advantage over their competitors in this single market.

In this reply, U S WEST again discusses the solution that Congress intended and that many commenters do endorse: encouraging inter-sector competition and achieving regulatory parity by *de*regulating all providers of competitive data services and nonbottleneck network facilities. First, the evolving single market for broadband services makes the forward extension of sixty-year-old regulatory classifications untenable. Second, Commission regulations, most notably unbundling and discounted resale rules, diminish network providers' incentives to invest in infrastructure and deploy advanced capability; accordingly, the Commission should limit the application of these regulations to those few facilities and services for which no functional substitutes are available in the marketplace. Finally, the Commission should reject the ISPs' demand for new regulations of incumbent LECs. There are already extensive protections in place — the *Computer III* and ONA rules — that have well safeguarded the interests of enhanced service providers; and the ISPs' unsubstantiated and inflammatory accusations of discrimination obscure the fact that U S WEST has, voluntarily and in good faith, gone well beyond its *Computer III* and ONA obligations to work with state public utility commissions and the ISP community to accommodate ISP concerns.

## I. COMMENTERS CONFIRM THAT CONVERGENCE IS CREATING A SINGLE MARKET FOR BROADBAND SERVICES THAT ERODES LAST-MILE BOTTLENECKS AND IS SELF-POLICING.

As the Commission hoped would happen, network providers from many different sectors of the communications industry have participated in this proceeding. Incumbent LECs,

CLECs, satellite providers, cable providers, fiber wholesalers, and different types of mobile and fixed wireless carriers, for example, filed comments describing their plans to deploy advanced data infrastructure and services. Even though these commenters employ very different transmission technologies (and offer competing "last miles" to their end users), there is a remarkable overlap in the services they provide and the customers they are targeting; their comments demonstrate that, in a digital world with standard routing and compression protocols, *any* network provider able to move bits sufficiently quickly can offer end users a full complement of voice, video, and high-speed data services.[5/] These commenters agree that Congress anticipated such convergence by defining advanced telecommunications capability "without regard to any transmission media or technology." Act § 706(c).[6/]

These parties also confirm that convergence is driving the evolution of a single broadband market, and that network providers from historically different segments of the communications industry now perceive one another as direct competitors. Commenters describe a market in which the incumbents in formerly discrete services are now new entrants in all others: LECs who are incumbent telephone service providers are using xDSL technologies to become new entrants in the multichannel video market, for example, while cable incumbents are

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[5/] *See, e.g.*, American Public Power Ass'n at Attachment A; AT&T at 9-16, 20-22; Bell Atlantic at Attachment A; BellSouth at 13-31; CTIA at 2-8; PCIA at 8-16; Qwest at 9-16; Skybridge at 7-9; Teligent at 1-6.

[6/] *See, e.g.*, ADC Telecommunications at 5-7; AT&T at 3-5; Cincinnati Bell at 7; Commercial Internet eXchange at 8; Nat'l Cable Television Ass'n at 19.

moving in the reverse direction.[7/] The comments also portray a market in which facilities-based, intermodal competition — *not* the heavy hand of the regulator — is both a powerful spur to innovation and a strong protector of consumers' interests.[8/] Many commenters cite the example of competition between cable modem and xDSL service providers, and although the commenters disagree about who was the market innovator and who followed,[9/] nobody disputes that each provider now must take account of what its competitor is doing when setting prices and offering services, even though the two firms supposedly operate in different (and differently regulated) sectors of the industry. Such a market structure creates choice in the last-mile bottleneck and

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7/ *See, e.g.*, AT&T at 14; BellSouth at 13-17; U S WEST at 9 and n.12.

8/ *See, e.g.*, American Public Power Ass'n at 6-7; Ameritech at 6-7; BellSouth at 33-36, 47-49; Cincinnati Bell at 16-19, GTE at 34-35; Nat'l Cable Television Ass'n at 24-25; Progress & Freedom Foundation at 55-56; Technology Entrepreneurs Coalition at 4-6.

9/ For example, in an attempt to deny that incumbent LECs have the ability or incentive to invest in new technologies (and thereby to downplay the harm caused by regulatory barriers to LEC innovation and investment), several CLECs and cable MSOs claim that incumbent LECs have deployed xDSL only in markets where cable modems and CLEC xDSL services are available. *See, e.g.*, AT&T at 10; DSL Access Telecommunications Alliance at 8-9; Information Technology Ass'n of America at 7. This is incorrect. When U S WEST announced its 14-state, 43-city rollout of MegaBit services, cable modem services were offered in only 3 of those markets, and CLECs had yet to offer xDSL in any of them. Moreover, this claim would be meaningless even if true: A market-driven competitive response by an incumbent LEC to facilities-based entry is something to encourage, not criticize.

More fundamentally, the suggestion that incumbent LECs bring nothing to the advanced services marketplace and can be safely benched is dangerous to consumer welfare and directly contrary to the command of Section 706. *See, e.g.*, Separate Statement of Commissioner Michael K. Powell at 1, attached to Mem. Op. and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. No. 98-147 *et al.* (rel. Aug. 7, 1998) ("*Advanced Services Order*") ("Simply put, we cannot relegate BOCs or other big companies to the sidelines in the data services 'race' unless we are prepared to deny the economy and consumers of the benefits of these companies' expertise and capital ").

prevents any one network provider from disadvantaging end users or downstream providers such as ISPs.

Commenters also agree with U S WEST that the Commission's failure thus far to adjust its policies to the realities of convergence has discouraged, and will continue to discourage, the development of intermodal competition. By flatly decreeing that every time an incumbent LEC uses a certain kind of *technology* (packet switching) it necessarily provides a *service* (telephone exchange service or exchange access) subject to section 251(c) unbundling and discounted resale,[10/] the Commission has permanently disadvantaged incumbent LECs relative to every other firm in the advanced services marketplace, even though all may provide identical or substitute services.[11/] The single-minded focus on helping firms compete with the incumbent LECs through inputs provided by the incumbents themselves discourages those LECs from deploying the technology needed to compete with anybody else — including the incumbent cable providers, who possess more control over their networks than telephone companies do but without any of the unbundling or nondiscrimination safeguards. These policies deprive consumers of incumbent LEC-provided services and force them to pay higher prices for services provided by the companies the Commission has insulated from incumbent-LEC competition.

Competitors who benefit from this artificial regulatory leg-up argue that the Commission is powerless to correct the disparity. They argue, correctly, that Section 706 is a

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10/ *Advanced Services Order* ¶¶ 42-44. In doing this, the Commission never articulated actual definitions of "telephone exchange service" or "exchange access services"; rather, it simply said that it saw no reason to exclude packet-switched services from their reach. *Id.* ¶ 42.

11/ *See, e.g.*, BellSouth at 36-38, 42-44; GTE at 14-16; GVNW at 6.

deregulatory provision that requires the Commission to *lift* regulatory barriers to infrastructure investment and cannot be read to give the Commission authority to extend incumbent-carrier Title II regulation to new providers or services.[12] But U S WEST is not proposing to achieve parity by shackling everyone to the same innovation-frustrating regulations to which it is subject. Rather, U S WEST and other commenters are asking the Commission to cabin incumbent regulation to those particular services and network facilities where providers are in fact incumbents with market power or bottleneck control.[13] When those providers are instead new entrants in the multi-provider market for broadband — an arena, the Commission has recognized, in which the incumbent LEC "does not currently enjoy the overwhelming market power that it possesses in the circuit-switched voice telephony market"[14] — the rationale (and congressional authorization) for incumbent carrier regulation disappears. The Commission should reject the self-serving suggestion of the current recipients of regulatory largesse that incumbent LECs must be fenced off from contributing to the advanced services market on an equal basis.[15]

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12/ *See, e.g.*, Comcast at 7-8; Nat'l Cable Television Ass'n at 20-21, 26; Time Warner at 8-9.

13/ *See, e.g.*, BellSouth at 4-6, 36-38; Progress & Freedom Foundation at 56-57.

14/ *Advanced Services Order* ¶ 10.

15/ AT&T, for instance, goes so far as to say Congress intended that only *competitors* of incumbent LECs would be regulated in ways that "seek to encourage them to unproven new technologies." AT&T at 37. This is nonsense. The 1996 Act takes many steps to encourage incumbent LECs to enter new markets and make innovative uses of their telephone plant. For example, the Act added a new part to Title VI authorizing common carriers to use their telephone networks to provide multichannel video services in competition with incumbent cable monopolies free from Title II. *See* 47 U.S.C. §§ 522(7)(C), 571(b). Congress clearly did not view incumbent LECs as the one group of companies whose innovations and investments were not welcome in the marketplace, and the Act would permit no such discrimination.

## II. THE COMMENTS OF MOST FACILITIES-BASED PROVIDERS CONFIRM THAT UNBUNDLING, DISCOUNTED RESALE, AND PRICE AND PRODUCTIVITY REGULATIONS DISCOURAGE INVESTMENT IN ADVANCED TELECOMMUNICATIONS INFRASTRUCTURE.

The commenters largely agree on what gives *any* network provider the incentive to invest in new infrastructure and develop innovative new services: the ability to differentiate oneself from one's competitors and profit from one's investments.[16/] In Section 706, Congress recognized that regulation can blunt that incentive by reducing the rewards of risk-taking, preventing carriers from differentiating themselves from their competitors, and introducing delays and uncertainties into the deployment of new services. Accordingly, Congress directed the Commission to exercise "regulatory forbearance" and "take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment" that the Commission identifies in this inquiry. Act §§ 706(a), (b).

As Chairman Kennard properly recognized at the beginning of these deliberations, unbundling, discounted resale, and price and productivity regulations discourage incumbent LECs from investing in advanced infrastructure, to the ultimate detriment of the public:

> To provide the advanced services, telephone companies will have to invest in advanced electronics. But the telephone companies have rightly asked, why should we make this new investment if we simply have to turn around and sell this new service — or the capabilities of

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16/ As even MCI recognizes, "[c]ompetition in the marketplace will lead to more rapid innovation because carriers will have the natural incentive to distinguish themselves from competing carriers by bringing new services to the market. In the end, this incentive will accelerate technology development, foster competition and reduce costs for customers." MCI and WorldCom at 13. *See also, e.g.*, Bell Atlantic at 14; Ameritech at 13-14; Cincinnati Bell at 13-15; PCIA at 16-17; Technology Entrepreneurs Coalition at 4-6.

> these electronics — to our competitors? If the telephone company has opened up its underlying networks to competition, the competitors can invest in the same advanced services.
>
> Where networks are open, I see no reason to require discount resale or unbundling of these new services and advanced technologies that are available to all.[17]

Not surprisingly, the comments filed by incumbent telephone companies confirm the Chairman's assessment that these rules diminish their incentives to take risks and invest in the facilities needed to deploy advanced services to all Americans.[18] The comments of organizations representing members of the public with an interest in ensuring the widest possible deployment of advanced services likewise agree.[19]

Equally or even more important, cable operators, facilities-based CLECs, and other network providers *also* agree that these network-access and other regulations discourage providers from investing and innovating. Now that ISPs are asking the Commission to impose forms of unbundling and open-network regulation on these alternative networks, these providers apprehend the costs of the restrictions that they have previously advocated placing on incumbent LECs. AT&T now argues that "imposing incumbent-style obligations on new entrants would inhibit those companies' ability and incentive to invest in building the very facilities that the

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[17] Chairman William E. Kennard, "A Broad(band) Vision for America" at 5 (June 24, 1998).

[18] *See, e.g.*, Ameritech at 15; Bell Atlantic at 9-11; BellSouth at 54-55; GTE at 14-16.

[19] *See, e.g.*, Alliance for Public Technology at 4-5; Campaign for Telecommunications Access at 9-11; United Homeowners Ass'n at 9-10; Progress & Freedom Foundation at 48-49.

1996 Act seeks to promote."[20] Similarly, Comcast describes how extending any form of the incumbents' regulatory burdens to CLECs, cable companies, broadcasters, and ISPs would discourage them from deploying advanced telecommunications capability:

> Each of these groups of firms will divert resources away from offering services competitive with "telecommunications" if the result of providing such nascent competition is — or even might be — oppressive regulatory obligations such as rate regulation, unbundling, mandatory service to all potential customers on demand, or collocation. To the contrary, these firms will have every incentive to avoid deploying their potentially useful resources as "advanced telecommunications capability" . . . if the regulatory consequences of crossing the line into "telecommunications" are vague, potentially onerous, or both.[21]

The National Cable Television Association is the most blunt of all: "'Regulatory intervention' that leads to new burdens on competitive providers of advanced networks would turn section 706 on its head by suppressing investment in advanced infrastructure. *Section 706 does not empower the Commission to commandeer advanced infrastructure for the benefit of entities that choose not to take the risks of building their own facilities.*"[22] U S WEST wholeheartedly agrees with these assessments, which are echoed by others.[23]

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[20] AT&T at 40.

[21] Comcast at 17.

[22] Nat'l Cable Television Ass'n at iii (emphasis added).

[23] *See, e.g.*, ADC Telecommunications at 17-18; Cablevision at 6; Technology Entrepreneurs Coalition at 15-19.

To be sure, each of these companies proffers some unpersuasive justification for continuing to hold its significant potential competitors, the incumbent LECs, to the full complement of regulations it seeks to avoid.[24/] But that cannot change the basic point: A broad range of network providers agrees that unbundling, discounted resale, and price and productivity regulations do impose real costs on providers that discourage them from taking the risks inherent in developing new services and from investing in the infrastructure needed to deploy these services to all Americans. In light of those costs — which ultimately are borne by the consumers who are denied beneficial services — the Commission should use such regulatory tools only where truly necessary. Unbundling and discounted resale obligations are appropriate only for the narrow class of essential facilities and services that currently are unavailable to competitors from any source, including sources other than the incumbent provider, and for which there are no comparable functional substitutes. Where competitors are able to obtain needed inputs from other sources (including providers in other industry segments using different network

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[24/] AT&T argues that unbundling and resale should not apply to CLECs, cable operators, and wireless providers "because their facilities are not essential facilities for new entrants, and these firms do not possess market power over telecommunications." AT&T at 39. But as explained in the text, the facilities that U S WEST asks the Commission to refrain from regulating are competitively available and thus not "essential." U S WEST has always agreed that the rules should apply to facilities such as loops while they are bottlenecks, but not beyond that. Like AT&T, Comcast and NCTA also generically cite "market power" as a reason to continue heavy regulation of incumbent LECs. Comcast at 19 and n.32; Nat'l Cable Television Ass'n at 25. As the Commission recognized in its *Advanced Services Order*, however, an incumbent LEC's power in the circuit-switched voice market does not translate into power in the advanced services market, where it starts with the same zero market share as everyone else. *See Advanced Services Order* ¶ 10; *see also* Chairman William E. Kennard, "A Broad(band) Vision for America" at 5 (June 24, 1998) ("All companies are new entrants when it comes to these services."). Incumbent LECs' power in the circuit-switched market is no more or less relevant to the advanced-services market than incumbent cable operators' power in the MVPD market.

technologies), the limited incremental benefits of imposing strict network access duties on the incumbent are far outweighed by the costs of depressing the incumbent's incentives (and the incentives of new entrants) to innovate and invest in advanced telecommunications capability.[25/]

Ultimately, there is a broad consensus in the comments as to what regulatory climate best "encourage[s] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by multiple, competing facilities-based providers: a climate of *de*regulation that relies on market incentives to encourage carriers to innovate, invest in infrastructure, and set their entry strategies. The Commission should not attempt to guide the direction of technological development or examine individual sectors of the marketplace to decide whether there should be more or fewer competitors in particular market segments. Commenters cite the ISP, CMRS, and Internet backbone industries as examples of sectors that have thrived as a result of conscious decisions by the Commission to forbear from regulating them.[26/] Cable operators (and soon-to-be cable operators, such as AT&T) explain that relative deregulation enabled them to accelerate their investments in infrastructure and network

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25/ For example, as the Commission has acknowledged by proposing that incumbent LECs be permitted to avoid unbundling network electronics by putting them in a separate affiliate, competitors do not in fact *need* to obtain most of the facilities used to provide xDSL from the incumbent. The facilities are therefore not essential for new entrants, and requiring competitors to purchase them in the open market does not "impair" their ability to provide xDSL services. *See* 47 U.S.C. § 251(d)(2)(B). The Commission should therefore refrain from requiring incumbent LECs to unbundle these facilities *whether or not* the incumbent places them in a separate affiliate. *See* Comments of U S WEST Communications, Inc., *Advanced Services NPRM* at 5-8 (filed Sep. 25, 1998).

26/ *See, e.g.*, America Online, Inc. at 6 & n.10; AT&T at 40-42; Bellcore at 1-3.

upgrades,[27] and they ask the Commission to "isolate" cable-modem services from Title II regulation in order to "foster the development of competitive broadband and advanced communications."[28] There is no reason to think that incumbent LECs respond to regulatory incentives and disincentives differently than companies in these other segments, and Section 706 does not direct the Commission to encourage the deployment of advanced telecommunications capability *only* by parties other than incumbent LECs. Therefore, if the Commission hopes to make good on its "commit[ment]" to "ensur[e] that incumbent LECs make their decisions to invest in and deploy advanced telecommunications services based on the market and their business plans, rather than regulation,"[29] it must be prepared to limit its regulation of incumbent LECs, just as it has done for other segments of the marketplace.

## III. THE ISPS OBSCURE THE FACT THAT THERE ARE EXTENSIVE SAFEGUARDS IN PLACE TO ENSURE THAT THEY ARE TREATED EVENHANDEDLY BY INCUMBENT LECS.

Several individual Internet service providers and coalitions of ISPs accuse the incumbent LECs of deploying advanced telecommunications capability in a way that favors their own enhanced services or enhanced-service affiliates, and they call on the Commission to adopt sweeping new regulations of the incumbents.[30] Some of these commenters make undocumented

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27/ *See, e.g.*, Nat'l Cable Television Ass'n at 2-4; Progress & Freedom Foundation at 40-42.

28/ AT&T at 39 (quoting Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, OPP Working Paper Series 30, at 86 (1998)).

29/ *Advanced Services Order* ¶ 13.

30/ *See* Retail Internet Service Providers ("Retail ISPs") at 10; Coalition of Utah (continued...)

(and unverified) allegations of discrimination by U S WEST, attach unadjudicated complaints from state public utility commission proceedings,[31] or recycle allegations from a complaint that a state commission specifically *declined* to pursue.[32] At the same time, at least one of these critics properly recognizes that the only reason that ISP complaints appear to center on U S WEST is that it is the company that has deployed xDSL services most widely.[33]

The new regulations that the ISPs propose are entirely unnecessary. U S WEST views the offering of xDSL services to independent ISPs as a business opportunity and treats it as such. Moreover, incumbent LECs such as U S WEST do not provide advanced services in a vacuum. Unlike cable operators, who are now entirely free to bundle Internet access with their

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30/ (...continued)
Independent Internet Service Providers ("Utah Coalition") at 4, 9; Commercial Internet eXchange Association at 17-18.

31/ The Retail ISPs attach a complaint filed with the Minnesota Public Utilities Commission by the Department of Public Service and Office of the Attorney General. The complaint has not yet been investigated, let alone adjudicated, and the Commission is in the middle of hearing arguments on a motion to dismiss it. Moreover, as explained *infra*, the bulk of the complaint concerns sales and provisioning practices that U S WEST adopted either to comply with the Commission's *Computer III* and ONA rules or to accommodate the specific concerns of ISPs and that the Washington and Oregon state public utility commissions approved.

32/ The Utah Coalition spends much of its comments rehashing allegations that were the subject of an informal complaint it made to the Utah Public Service Commission in May 1998. *See* Utah Coalition at 3-6. After a preliminary investigation, however, the Utah PSC decided there was no basis for pursuing the complaint. The Utah Coalition blames this decision on a state statute that gives LECs greater pricing and tariffing flexibility in deploying advanced new services, *id.* at 6, but the PSC has never suggested that the statute disables it from investigating or taking action against alleged discrimination in the marketplace.

33/ Retail ISPs at 9 n.12 ("The Retail ISPs have no reason to think that U S West's conduct regarding the deployment of xDSL and its relations with its ISP affiliate are any more or less abusive than would be the case with any other ILEC. U S West is simply farther along in its xDSL rollout than any of the other ILECs.").

cable modem services, U S WEST may provide information services only in accordance with the Commission's *Computer III* and ONA rules.[34/] These rules are designed to ensure that BOCs give unaffiliated enhanced service providers (such as the ISP commenters) the same access to their basic telecommunications facilities and services that they provide to their own enhanced services or affiliates. For example, the rules require U S WEST to unbundle all of the basic service elements it uses to provide enhanced services; sell these elements to its affiliate (or impute their prices to its own enhanced services) from the same tariffs that unaffiliated providers use; and provision, install, and maintain these elements for their own enhanced services and independent ESPs on equivalent timetables. U S WEST must issue periodic reports to show that it is meeting these obligations and filling all providers' orders in an equally timely fashion. U S WEST must also give unaffiliated information service providers advance notice and technical documentation of all network changes, and may not use these new capabilities itself until after

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34/ *See Amendment of Section 64.702 of the Commission's Rules and Regulations* ("*Computer III*"), Report and Order, Phase I, 104 FCC 2d 958 (1986) ("*Phase I Order*"), *recon.*, 2 FCC Rcd 3035 (1987) ("*Phase I Recon. Order*"), *further recon.*, 3 FCC Rcd 1135 (1988) ("*Phase I Further Recon. Order*"), *second further recon.*, 4 FCC Rcd 5927 (1989) ("*Phase I Second Further Recon.*"), *Phase I Order and Phase I Recon. Order, vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"); Phase II. 2 FCC Rcd 3072 (1987) ("*Phase II Order*"), *recon.*, 3 FCC Rcd 1150 (1988) ("*Phase II Recon. Order*"), *further recon.*, 4 FCC Rcd 5927 (1989) ("*Phase II Further Recon. Order*"), *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) ("*ONA Remand Order*"), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) ("*California II*"); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*"), *recon. dismissed in part*, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*").

they have been disclosed and made available to unaffiliated providers.[35] Importantly, given the ISPs' complaints about U S WEST's methods of marketing its MegaBit xDSL and its Internet access offerings, the Commission's rules *permit* BOCs to jointly market their regulated telecommunications and unregulated information services as long as they observe proper cost allocation principles.[36]

As the attached description of U S WEST's practices demonstrates, U S WEST offers its xDSL and Internet services in strict compliance with the ONA and *Computer III* rules.[37] U S WEST's affiliated ISP, USWEST.net, takes MegaCentral (the connection that allows hosts to receive subscribers' xDSL traffic) on the same terms as it is available to unaffiliated ISPs. USWEST net waits in the same line for facilities and services as unaffiliated ISPs, and its orders are filled no faster or slower than orders of comparable complexity from other ISPs. U S WEST conducted the necessary network disclosures before tariffing MegaBit services; indeed, it went beyond what Commission rules require by contacting independent ISPs and inviting them to information sessions to explain exactly how they could provide xDSL service to their subscribers. USWEST.net is not permitted to order MegaCentral until other ISPs can place their orders, although many ISPs waited until well after the starting date to submit their

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35/ *See also* 51 C.F.R. § 51.325-.335.

36/ *See Phase I Order* ¶¶ 96-97.

37/ As has been previously noted, U S WEST's Internet access service is offered in compliance with three separate CEI plans that are on file with the Commission for on-line database services, protocol conversion, and electronic messaging. These plans contain specific procedures and safeguards that implement the requirements of *Computer III*, many of which are listed in the text and in the attachment to these comments.

requests, which delayed the provisioning of their connections.[38] Unanticipated demand for xDSL services (combined with the failure of many ISPs to provide U S WEST with demand forecasts) resulted in some facilities shortages, but those shortages affected USWEST.net and unaffiliated ISPs equally.

U S WEST has also gone well beyond these *Computer III* and ONA safeguards to work with ISPs and state regulators to develop an ordering process that enables potential subscribers to connect to whatever xDSL-capable ISP they choose and does not steer them to any particular ISP. As detailed in the attachment to this reply, U S WEST gives unaffiliated ISPs several ways for their subscribers to order xDSL service without ever going through a U S WEST representative or even hearing about USWEST.net; ISPs can place orders for their subscribers by submitting electronic letters of authorization to U S WEST, for example, or give potential subscribers a "safe harbor" toll-free number to call where USWEST.net is never mentioned. Even if a potential customer does call the U S WEST sales channel, he can be transferred to the "safe harbor" at any time. U S WEST designed these and other safeguards at the request of several ISPs and with the approval of the Oregon and Washington public utility commissions. U S WEST continues to monitor the sales and ordering processes and will modify them as necessary.

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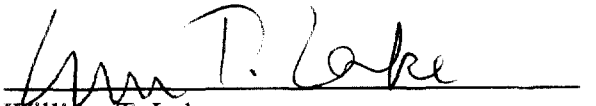
[38] Although several state public utility commissions did postpone U S WEST's offering of its retail subscriber xDSL services to enable some of these unaffiliated ISPs to catch up, *cf.* MCI and WorldCom at 29, this does not change the fact that the ISPs' delays in receiving MegaCentral connections were due to their failure to order service in a timely fashion, combined with the routine vagaries inherent in any facilities installation.

This is not to say that U S WEST's rollout of MegaBit services and its efforts to coordinate with unaffiliated ISPs have been entirely free from glitches; as with any new service (and especially with one deployed so quickly and on such a broad scale), there were a few missteps at the start, described both in the ISP comments and in the attachment to this reply. But U S WEST has made a good-faith effort to work with unaffiliated ISPs and state regulators to correct course as necessary, and the safeguards described in the previous paragraphs are intended to ensure that the early mistakes are not repeated. Moreover, the benefits to consumers of having xDSL services available on a wide scale and on a greatly accelerated basis far outweighs the minimal harm that any missteps caused. Importantly, the parties have been able to work these issues out within the context of *existing* enhanced service rules; there is no need to layer yet another set of regulations on these services. It would of course be manifestly inappropriate to do

so as a result of this proceeding, where the Commission is supposed to be looking at ways to *lift* regulatory barriers to investment.

Respectfully submitted,



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October 8, 1998

**Attachment to U S WEST Communications, Inc.'s Reply Comments**

## REGULATORY AND VOLUNTARY SAFEGUARDS APPLICABLE TO U S WEST'S ADVANCED NETWORKING SERVICES

U S WEST offers data services and products subject to a variety of regulatory and self-imposed safeguards that fully protect the interests of unaffiliated Internet service providers. Some ISPs have nevertheless expressed concerns in their comments on the Commission's Notice of Inquiry that the BOCs' — and, in particular, market leader U S WEST's — provision of information services threatens to curtail unaffiliated ISPs' opportunities to compete. U S WEST has carefully considered such concerns in designing and deploying its advanced data services; ISPs are not simply competitors of the USWEST.net ISP service, but valued customers of U S WEST's MegaBit service. U S WEST accordingly has gone to great lengths to ensure that all ISPs have unfettered access to customers of U S WEST's advanced telecommunications services.

U S WEST's voluntary safeguards are an overlay on the Commission's *Computer* rules, which on their own prevent discriminatory interconnection arrangements and cross-subsidization of unregulated activities by regulated ones. To supplement these mandatory protections, U S WEST has, among other things, (1) met with unaffiliated ISPs at an early juncture in each state in which it has deployed advanced services to make them aware of ordering and provisioning requirements; (2) taken prompt action wherever possible to alleviate the effects of provisioning delays; (3) created a "safe harbor" in its sales channel so that sales consultants will not pitch USWEST.net to customers who are not interested in the service; and (4) gone so far as to establish, at significant expense, joint marketing procedures that allow independent ISPs to cut U S WEST out of the sales process entirely, should they wish to serve as a customer's only point of contact.